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No. 08-805

In the Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTH CARE CENTER, PETITIONER

v.

SUE CARTER, SPECIAL ADMINISTRATOR OF THE
ESTATE OF JOYCE GOTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

REPLY BRIEF FOR THE PETITIONER

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONER

Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court held that (1) the substantive protections of § 2 govern state-court proceedings as well as those in federal court, and (2) generalized anti-waiver language in a state statute, which effectively precludes arbitration of disputes, does not constitute a ground that exists "at law or in equity for the revocation of any contract" within the meaning of § 2's savings clause even if the state statute does not expressly mention arbitration. In *Preston v. Ferrer*, 128 S. Ct. 978 (2008), this Court reaffirmed the viability of *Southland* and held that § 2 preempted a state statute even though the state statute did not expressly mention or otherwise specifically target arbitration for special treatment.

In direct conflict with *Southland* and *Preston*, the Illinois Court of Appeals in the case below held that § 2 does not preempt the generalized anti-waiver provisions of the Illinois Nursing Home Care Act (INHCA) because the "emphatically stated public policy" expressed in INHCA's anti-waiver provisions "concerns the validity, revocability, and enforceability of contracts generally and does not specifically target arbitration agreements." Pet. App. 10a. As explained in both the petition for a writ of certiorari filed by SSC Odin Operating Company LLC, doing

business as Odin Health Care Center (the Center), and the brief of *amici curiae* in support thereof,* the lower court's ruling cannot be reconciled with *Southland* and *Preston*. In addition, the lower court's ruling conflicts with the law of four federal circuits and presents substantial questions of federal law deserving of this Court's review.

At the Court's request, respondent Sue Carter has filed a response to the Center's petition. Ms. Carter's brief in opposition provides no persuasive reason for this Court to leave the lower court's conflicting ruling undisturbed, arguing to no avail that the Center's petition should be denied because Ms. Carter believes she will prevail on legal questions that were not decided by the court below and that would be addressed on remand. While it is true that Ms. Carter may raise legal arguments on remand that were presented to, but not decided by, the lower court, that fact is irrelevant for present purposes. What is relevant is the fact that the lower court's decision stands in direct conflict with *Southland* and *Preston*—something Ms. Carter makes no effort to refute. Accordingly, the Center's petition should be granted and the judgment below reversed summarily via a per curiam opinion. Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the lower court.

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* The Chamber of Commerce of the United States of America, the American Health Care Association, the Illinois Health Care Association, the Illinois Council on Long Term Care, and the Alliance for Quality Nursing Home Care filed a brief in support of the Center.

A. Ms. Carter's Arguments in Defense of the Lower Court's Judgment Lack Merit

Despite this Court's request that she do so, Ms. Carter makes no attempt to refute the principal argument presented by the Center and its several *amici* that the lower court's ruling conflicts with *Southland* and *Preston*. Ms. Carter's brief in opposition does not even mention *Southland* or *Preston* even though the Center's petition and the brief of *amici* explained in detail why the lower court's ruling cannot be reconciled with *Southland* and *Preston*.

Instead, Ms. Carter attempts to divert this Court's attention to irrelevant issues of law on which the lower court did not pass and to misstating certain of this Court's FAA holdings. That effort fails.

1. According to Ms. Carter, the lower court's decision should not be disturbed because, were this Court to reverse that ruling and remand the case, Ms. Carter will have other grounds on which to challenge the arbitration agreements at issue in this case. *See* Br. in Opp. 4. Contrary to Ms. Carter's suggestion, however, simply because reversal of the lower court's ruling will result in additional litigation on remand does not counsel in favor of allowing the lower court's conflicting ruling to stand.

In *Perry v. Thomas*, 482 U.S. 483 (1987), for example, this Court reversed the ruling of the state court below and held that a state statute was preempted by the FAA. In so ruling, the Court refused to address an argument that the arbitration agreement in question was an unenforceable contract of adhesion because that issue "was not decided below . . . and may likewise be considered on remand." *Id.*

at 492 n.9. In the plainest of terms, *Perry* also explained that the assertion of an alternative ground for denying arbitration, which was not decided below and may be addressed on remand, "does not prevent [this Court] from reviewing the ground exclusively relied upon by the courts below" even if the alternative ground being asserted is that the respondent was not a party to the arbitration agreement in question. *Id.* at 492.

This Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005). Therefore, Ms. Carter's discussion of the merits of legal questions on which the lower court did not pass and would decide on remand is irrelevant. The exclusive ground relied upon by the court below was that the FAA does not preempt INHCA's generalized anti-waiver provisions. That decision cannot stand in light of *Southland* and *Preston*.

Even were this Court to consider the merits of Ms. Carter's argument, it should be rejected. Both arbitration agreements expressly provide that their terms bind persons such as Ms. Carter, stating: "It is the intention of the Facility and the Resident that this Agreement shall inure to the benefit of *and bind* . . . the Resident, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and the Legal Representative, his/her successors, assigns, agents, attorneys, insurers, heirs, trustees, and representatives or executor of his or her estate." Pet. App. 23a-24a, 30a-31a (emphasis added). Whether this contractual language may be enforced to require arbitration of the wrongful-death claim found in Ms. Carter's Com-

plaint is a question of law the lower court did not decide and would decide on remand.

Furthermore, Ms. Carter mistakenly asserts (Br. in Opp. 6) that there is no "contention that respondent Carter entered into any agreement to arbitrate any claim," and that the Center agrees Ms. Carter's wrongful-death claim "is not subject to the arbitration agreement [sic]." To the contrary, Ms. Carter signed one of the arbitration agreements in question. *See* Pet. App. 26a (evidencing Ms. Carter's signature as the "Legal Representative" of Ms. Gott). That agreement, in turn, expressly provides that its terms "continue to be valid for any stay at this Facility by this Resident, even when the Resident has been discharged and later readmitted." *Id.* at 25a. Therefore, Ms. Carter's assertions regarding the Complaint's wrongful-death cause of action are "nothing short of baffling." *Major League Players Ass'n v. Garvey*, 532 U.S. 504, 510 (2001) (per curiam); *see also Arthur Anderson LLP v. Carlisle*, No. 08-146, slip op. at 6-7 (U.S. May 4, 2009) (recognizing traditional state-law principles allow arbitration agreements to be enforced against nonparties to those agreements).

2. Nor is this merely an instance where the lower court "misapplied correctly stated legal principles to the particular Illinois statutes involved in this case." Br. in Opp. 9. As the Center's petition explained in detail (at 16-19), the lower court purported to apply only two of this Court's numerous FAA decisions: *Perry* and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). In doing so, the lower court not only misconstrued the holdings of *Perry* and *Casarotto*, it completely disregarded the holdings of *Southland*

and *Preston*. *See* Pet. 18 ("Read correctly, *Perry* and *Casarotto* stand for the proposition that § 2 of the FAA preempts those state laws that 'single out' arbitration agreements for special treatment. As demonstrated by *Southland* and *Preston*, however, *Perry* and *Casarotto* do *not* stand for the converse proposition: namely, that state laws avoid FAA preemption so long as they do not 'single out' arbitration agreements for special treatment.").

Ms. Carter's brief in opposition repeats this fundamental error. Not only does she completely disregard the holdings of *Southland* and *Preston*, Ms. Carter resorts to editing a quotation from one of this Court's decisions to support the lower court's flawed ruling, adding words to create a limitation not imposed by this Court. Specifically, Ms. Carter argues that "in enacting the FAA 'Congress *[only]* precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.'" Br. in Opp. 9 (purporting to quote *Perry*, 482 U.S. at 492 n.9) (brackets supplied by Ms. Carter; emphasis added). This argument is flawed for at least two reasons.

First, the language Ms. Carter purports to quote comes from *Casarotto*, not *Perry*. *See Casarotto*, 517 U.S. at 687 ("By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'") (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

Second and more importantly, Ms. Carter's argument turns on her addition of the word "[only]"—

an addition that misstates the holding of *Casarotto* and directly conflicts with *Southland* and *Preston*. As *Southland* and *Preston* make clear, § 2 does not *only* preempt state statutes that single out arbitration provisions for suspect status; instead, § 2 also preempts state statutes that, even if they do not expressly mention arbitration, have the effect of precluding arbitration.

3. The Center's petition also explained (at 19-24) how the decision below conflicts with the law of four federal circuits. According to Ms. Carter, however, the cases cited by the Center "involve the very different question whether statutes that forbid the enforcement of forum selection clauses in franchise or construction contracts are preempted by the FAA when applied to arbitration agreements including such clauses." Br. in Opp. 10.

While the circuit decisions cited by the petition involved statutes affecting industries other than the long-term care industry, that fact is immaterial. It is the *legal reasoning* of the circuit decisions that demonstrates the fallacy of the reasoning of the Appellate Court of Illinois. Contrary to the decision below, the federal courts of appeals have unanimously held that the FAA preempts state laws that invalidate only certain types of clauses in some, but not all, contracts, regardless of whether the state laws on their face "single out" arbitration for special treatment. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001) (surveying rulings from the First, Second and Fifth Circuits and adopting their logic).

Ms. Carter's meager, one-paragraph response is that the circuit decisions involved franchise agree-

ments and construction contracts, not contracts between nursing facilities and their residents. *See* Br. in Opp. 10. She therefore characterizes as "chimerical" the conflict described in the Center's petition. *Id.* Tellingly, Ms. Carter makes no effort whatsoever to address the legal reasoning of the circuit rulings. As with her refusal to address the fact that the decision below conflicts with *Southland* and *Preston*, Ms. Carter has effectively chosen not to respond to the petition's argument that the ruling below also conflicts with the law of four federal circuits.

4. Nor has Ms. Carter refuted the Center's assertion (Pet. 24-29) that the petition raises substantial federal questions deserving of this Court's review. Instead, Ms. Carter repeatedly suggests that the petition should be denied because INHCA is an "unusual" statute. Br. in Opp. 1, 2, 11. The Center has "only" identified statutes identical to INHCA in two other States and the Center has "only" identified a conflict between federal and state courts within one of those States (i.e., Oklahoma). *Id.* at 10. The "views of one intermediate state appellate court on preemption of an unusual state statute," *id.* at 11, Ms. Carter contends, do not warrant this Court's review no matter how much the decision below conflicts with this Court's decisions or those of the federal courts of appeals. She is wrong.

One need go no further than *Preston* to refute Ms. Carter's assertion that the intermediate nature of the lower court in this case counsels against the granting of certiorari, for there the decision under review was that of the California Court of Appeal, not the Supreme Court of California. *See* 128 S. Ct. at 982; *see also* S. Ct. R. 10(c) (instructing that cer-

tiorari is appropriate when a state court has decided a federal question in a way that conflicts with decisions of this Court even if the state court in question is not of last resort).

Moreover, the lower court's use of the "singling out" theory, as explained in the Center's petition, is not an isolated occurrence of insignificant importance. It is "best viewed as a 'backdoor attempt to have the Supreme Court overrule *Southland*, which it already has refused to do.'" Pet. 24 (quoting Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind. L.J. 393, 410 (2004)).

The national importance of the issues raised by this case is further evidenced by the *amicus* brief filed in support of the Center. Among other things, the brief of *amici* explains that the "erroneous reasoning of the lower court's decision threatens to spawn litigation over the enforceability of [arbitration] agreements and thereby deprive both businesses and consumers of the substantial benefits of arbitration." *Amici* Br. 1. In addition, the brief of *amici* argues that the arbitration agreements at issue in this case were "based on a model agreement used by nursing homes throughout the nation." *Id.* at 4-5. As with almost everything else in this case, however, Ms. Carter ignores the arguments of *amici* altogether.

B. Summary Reversal Is Appropriate

Briefing on the merits and oral argument impose a burden on the Court and the parties. Such treatment is not necessary, however, when the decision under review conflicts with a previous decision of

this Court or when the logic of the lower court's decision is manifestly incorrect.

Under such circumstances, this Court has found it appropriate to grant the petition for a writ of certiorari and reverse the judgment of the lower court via a per curiam opinion. *See, e.g.*, *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (per curiam) (reversing summarily lower court's ruling because controlling precedent "considered and rejected the position taken by the [court] below"); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam) (reversing summarily lower court's ruling because its error was "obvious in light of" controlling precedent); *Smith v. Texas*, 543 U.S. 37, 48 (2004) (per curiam) (reversing summarily state appellate court's ruling because there was "no principled distinction" between the jury instruction found to be unconstitutional by a previous decision of this Court and the jury instruction about which the petitioner complained); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (per curiam) (reversing summarily state court ruling imposing an unduly narrow interpretation of the FAA's "involving commerce" requirement because this Court's decision fell "well within [its] previous pronouncements").

Although the Center welcomes the opportunity to brief in further detail the merits of this dispute and to present oral argument, this is a case in which those efforts should be unnecessary. As explained in the petition (at 10-16) and in the brief of *amici* (at 5-11), the decision below conflicts with *Southland* and *Preston*. Ms. Carter makes no argument to the contrary, nor does she give any reason for why summary reversal would be inappropriate in this case.

Summary reversal is especially appropriate in this case since it would hopefully shorten the amount of time this case remains in the judicial system—something the Center sought to avoid altogether when it executed two unambiguous arbitration agreements several years (and several hundred attorney-hours) ago. Summary reversal would also send a clear message to state courts akin to that sent by this Court in *Alafabco*: this Court's jurisprudence is not to be contorted so that courts can exercise their age-old jealously in favor of retaining jurisdiction over disputes, the parties to which have previously agreed to binding arbitration.

* * * * *

Earlier this year, the Court explained that, "[g]iven the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271-72 (2009). In playing that "prominent role," state courts must follow this Court's decisions interpreting the FAA. Unfortunately, clearly erroneous rulings such as that of the lower court below do not portend well. Only if this Court's FAA decisions are scrupulously applied will state-court rulings like that below become a thing of the past. To that end, the Court should "promptly remove from the menu the [lower court's] offering, a smuggled-in dish that is indigestible." *Spears*, 129 S. Ct. at 845.

For the foregoing reasons, as well those stated in the petition for a writ of certiorari and the brief of *amici*, the petition should be granted and the judgment of the Appellate Court of Illinois summarily re-

versed. Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the Appellate Court of Illinois.

Respectfully submitted.

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